United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1753

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To be argued by
William H. Oltarsh

8/21

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1753

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DEORAJ SINGH,

Petitioner,

-against-

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

- -

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

PETITIONER'S BRIEF

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Attorneys for Petitioner

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Statement of the Issue

Whether the arrest of the petitioner without a warrant and without any probable cause or reasonable suspicion existing prior to his arrest, search and seizure is contrary to his Fourth Amendment rights and consequently whether the evidence flowing from such arrest, search and seizure should be suppressed.

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105 (a), Deoraj Singh petitions this Court for review of a final order of deportation entered against him by the Board of Immigration Appeals on April 12, 1974. That order dismissed the petitioner's appeal from an order of a Special Inquiry Officer finding him deportable as an alien who had overstayed his temporary visit.

Statement of the Facts

The petitioner, a twenty-five year old married male alien, a native and citizen of Guyana, last entered the United States at New York, New York, on December 19, 1971, at which time he was admitted as a non-immigrant visitor for pleasure. At the time of his admission he was authorized to remain in the United States until March 1, 1972. He remained beyond that date without authority.

At the deportation hearing which occurred on September 14, 1973, the alien testified that an immigration officer came over to him and asked him for identification on June 11, 1973, at or about 12:30 p.m., at his place of employment at the Ganin Tire Company in Brooklyn. The alien told the officer he did not have identification but he would consult his attorney. The officer then asked which country the alien came from and he said Guyana. Then the officer put handcuffs on the alien and said he would take him to his office at 20 West Broadway. The alien did not resist and did not show anything. He just gave his hands to the officer and the officer put handcuffs on him. Prior to putting on the handcuffs the alien gave the officer no documents until he came to 20 West Broadway. The alien also testified that he did not voluntarily give his wallet to the officer at 20 West Broadway; that he was ordered to do so and complied.

At the deportation hearing the Service conceded that the testimony of the alien with regard to the arrest and whatever took

place at the interview at 20 West Broadway was true and correct.

The Immigration Judge found the petitioner deportable on the charge and granted him the privilege of voluntary departure. Appeal was timely made to the Board of Immigration Appeals on April 12, 1974. The appeal was dismissed and petitioner was permitted to depart from the United States voluntarily within sixty days from the date of the order or any extension beyond that time as would be granted.

ARGUMENT

THE ALIEN WAS ARRESTED, SEARCHED AND SEIZED WITHOUT WARRANT OR PROBABLE CAUSE OR REASONABLE SUSPICION, AND CONSEQUENTLY THE EVIDENCE OBTAINED BY THE IMMIGRATION SERVICE AS A RESULT OF SUCH UNLAWFUL ARREST, SEARCH AND SEIZURE SHOULD BE SUPPRESSED IN ACCORDANCE WITH THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In Condrado Almeida-Sanchez, Petitioner v. United States, 93 S. Ct. 2535 (1973), the Court held that Section 287(a) of the Immigration & Nationality Act could not justify a warrantless search without probable cause of an automobile stopped by the U. S. Border Patrol twenty-five air miles north of the Mexican border without search warrant and without probable cause of any kind for the stop or the subsequent search. There was not even a "reasonable suspicion" for a detention and weapons search which Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1869, 20 L. Ed. 2d. 889 (1968), and Adams v. Williams, 407 U. S. 143, required.

Section 287(a) of the Immigration & Nationality Act, 8 U.S.C. Sec. 1357(a) permits warrantless searches of automobiles and other

conveyances "within a reasonable distance from any external boundary of the United States," as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation 8 CFR 287.1 defines "reasonable distance" as "within" one hundred air miles from any external boundary of the United States.

The Court stated that Section 287(a) does not declare a field day for the Government in searching autos, and in following the Fourth Amendment's prohibition against unreasonable searches and seizures the Court has insisted upon probable cause as a minimum requirement. Granting that the Federal Government has the power to exclude aliens and inspect and search individuals or conveyances at the border, and conceding the Government's contention that the unlawful entry of aliens is a serious problem, the Court held nonetheless that the search violated the Fourth Amendment.

The dragnet search and seizure operation of the INS of persons who have the "appearance" of illegal aliens or are "foreign looking" is less supportable than a search of an automobile because it is not practicable to secure a warrant to search an auto as the vehicle can be quickly moved out of the jurisdiction.

The decision in Condrado Almeida v. Sanchez, supra, applies equally to the dragnet operation. The Court stated:

> "It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in

constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

'These (Fourth Amendment rights), I protest, are not mere second class rights but belong in the catalog of indispensable freedoms. Among the deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.' Brinegar v. United States, 338 U.S. 160, 180 (Jackson, J., dissenting)."

In a case decided the day after Condrado Almeida-Sanchez v. United States, supra, in the U. S. Court of Appeals, 5th Circuit, the Court of Appeals decided in a warrantless search of a camper vehicle fifty-five miles inland by customs and immigration officers, that there was no justification for a border search where there was no showing that the vehicle had crossed the border or that there had been any contact with those who had crossed the border. The Court stated that there must be a reasonable suspicion that an offense had

been committed or that forbidden persons or substances were hidden before the automobile could be stopped and passengers interrogated. The total absence of any fact which would justifiably arouse the officers' suspicions compelled the Court to reverse the conviction. United States v. Storm, 480 F. 2d 701 (1973).

In a criminal case decided in April 1973 the Court of Appeals in the 9th Circuit decided that customs agents, who had information that the defendants whose names or descriptions were unknown to the officers and who would be waiting for a shipment of heroin in San Francisco, did not have authority to arrest, with or without a warrant, upon mere suspicion. The Court held that the history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause could leave law abiding citizens at the mercy of the officers' whim or caprice. In this case the Court reversed the conviction because the customs officers had at most a suspicion that the defendants, observed by them at an airport in San Francisco, were in some way connected with the importation of heroin and that the agents did not have reasonable grounds or probable cause to make a warrantless arrest of defendants. Jit Sun Loo et al vs. U. S. et al, 478 F. 2d 401 (1973).

CONCLUSION

The petition for review should be sustained.

Respectfully submitted,

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Attorney for Petitioner